No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, *et al.*,
Petitioners,

v.

XAVIER BECERRA,
Attorney General of California, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* LEGAL SCHOLARS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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INTEREST OF *AMICI CURIAE*[1]

Amici are 23 professors whose research and teaching focus on constitutional law, nonprofit organizations, health law, and technology. *See* Appendix A (listing the individual law professors joining this brief). This brief addresses issues that are within amici's particular areas of scholarly expertise.

SUMMARY OF ARGUMENT

This Court applies strict scrutiny to content-based regulation of speech. Such scrutiny serves as a prophylactic against viewpoint-based discrimination, a particularly insidious form of content-based discrimination that can be difficult to discern directly. Where it is found, viewpoint discrimination is *per se* unconstitutional when the speech is private speech that is not spoken by, or otherwise affiliated with, the government.

Here, California has engaged in open and admitted viewpoint discrimination. Because of its disapproval of the viewpoint and expression of pro-life pregnancy clinics, it crafted regulations specifically designed to (1) compel licensed pro-life pregnancy clinics to advertise subsidized abortions and (2) compel unlicensed pro-life pregnancy clinics to dilute their advertisements with statements regarding their

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[1] All parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief. Amici are individuals who do not purport to speak on behalf of their respective institutions.

unlicensed status. Such viewpoint-discriminatory compulsion of speech is patently unconstitutional.

The regulations are discriminatory on their face, because they offer an exemption available to all *but* pro-life pregnancy clinics. The regulations exempt participants in state programs that require offering a full range of contraceptives, including emergency contraceptives to which pro-life clinics have moral objections. California claims that this exemption is justified by the fact that exempted clinics already offer a full range of reproductive health services, but this only underscores the viewpoint discrimination at issue: California expects those clinics to provide information about state-subsidized abortion voluntarily precisely because those clinics demonstrably do not share pro-life clinics' moral viewpoint regarding nascent human life.

California also explicitly justified its regulations by reference to the disfavored views of pro-life pregnancy clinics, but the Ninth Circuit erroneously held that such viewpoint-discriminatory purpose is acceptable if a law is facially neutral. But this Court holds, to the contrary, that "[t]he government must abstain from regulating when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

A viewpoint-neutral regulation would apply to all clinics providing any pregnancy-related services. California has crossed the line into prohibited viewpoint discrimination.

ARGUMENT

I. VIEWPOINT-BASED COMPELLED SPEECH STRIKES AT THE HEART OF THE FIRST AMENDMENT.

A. Prevention of viewpoint discrimination is *the* core principle of the Court's free-speech jurisprudence.

The First Amendment protects "the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994). Accordingly, this Court closely scrutinizes laws that restrict or mandate expression based on its content. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). When a state "requires the utterance of a particular message favored by the Government," it "contravenes this essential right." *Turner*, 512 U.S. at 641.

The scrutiny applied to content-based speech serves a vital function: ferreting out viewpoint-based discrimination by the government.[2] Content-based

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[2] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 451 (1996) ("The critical question is thus whether the distinction between content-based and content-neutral action – more specifically, the distinction among viewpoint-based, other content-based, and content-neutral action – facilitates the effort to flush out improper purposes. The distinction in fact serves just this

laws "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information and manipulate the public debate through coercion rather than persuasion." *Id.* Strict scrutiny ensures that the government cannot disguise an effort to favor a particular viewpoint. *See, e.g.*, *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992) ("The government may not regulate use based on hostility — or favoritism — towards the underlying message expressed.").

The risk of content-based state action is *always* present when the government compels speech, because such compulsion necessarily "dictate[s] the content of speech[.]" *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988). In this case, however, the law presents not just a mere risk of targeting disfavored viewpoints for unfavorable treatment; it presents a rare instance of *open, admitted* viewpoint discrimination. *Cf. Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J. dissenting) ("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing . . . But this wolf comes as a wolf."). The law at issue here does not merely hypothetically discriminate against dissenting viewpoints; it openly flaunts the very viewpoint discrimination that strict scrutiny of content-based regulation is designed to prevent.

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function: it separates out, roughly but readily, actions with varying probabilities of arising from illicit motives.").

B. Outside the context of government speech or government-sponsored speech, viewpoint discrimination is *per se* unconstitutional.

Preventing viewpoint discrimination is the core concern of this Court's First Amendment jurisprudence. "Content-based [speech] regulations," therefore, "are presumptively invalid." *R.A.V.*, 505 U.S. at 382. When found, viewpoint discrimination is *per se* unconstitutional, subject to one limited exception inapplicable here.[3] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) ("In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory."). This exception highlights the gravity of the viewpoint discrimination at issue here: instead of merely giving voice to its own view that abortion is a legitimate option for mothers to consider, or recruiting others to do so, the State has chosen to impress disfavored clinics into service as its mouthpieces. *See id.* at 578–79 ("But a State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction.").

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[3] That exception permits viewpoint discrimination "where the government itself is speaking or recruiting others to communicate a message on its behalf." *Matal v. Tam*, 137 S. Ct. 1731, 1789 (2017). It applies to speech requirements where the government seeks "to enlist the assistance of those with whom it already agrees[.]" *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2330 (2013). "The government may enlist the assistance of those who believe in its ideas to carry them to fruition," *id.* at 2332 (Scalia, J., dissenting), but it "may not . . . compel the endorsement of ideas that it approves." *Knox v. SEIU*, 567 U.S. 298, 309 (2012).

C. Viewpoint discrimination is no more permissible in the context of compelled speech than the context of banned speech.

For First Amendment purposes, the "difference between compelled speech and compelled silence . . . is without constitutional significance." *Riley*, 487 U.S. 781, 796 (1988). The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

Compelled speech is *always* content-based, because by definition it "dictate[s] the content of speech," *Riley*, 487 U.S. at 800, and so is always subject to the same "most exacting scrutiny" as laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner*, 512 U.S. at 642; *see also Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995) ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. . . . [T]he law . . . is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.") (citing *Barnette*, 319 U.S. at 642; *Pac.*

Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 20 (1986)).

II. THE NINTH CIRCUIT ERRED WHEN IT FOUND THAT THE ACT DOES NOT TARGET CLINICS FOR COMPELLED SPEECH BASED ON THEIR VIEWPOINT.

The court below concluded that the Reproductive FACT Act ("the Act") is content-based but not viewpoint-based. App. 41a. It asserted that: (1) it is irrelevant that the legislature targeted speakers based on their viewpoint if the law they employed is neutral on its face; (2) the Act "applies to almost all licensed and unlicensed speakers"; and (3) the exemptions in the Act are "unrelated to viewpoint." *Id.* at 41a–42a. The first assertion flouts this Court's clear instruction. The second is simply false. The third begs the question.

In fact, (1) the Court's cases hold that viewpoint-discriminatory purpose or justification is impermissible; (2) the Act does not apply to most clinics; and (3) the Act's exemptions are undeniably viewpoint-related. Indeed, not only do Respondents admit that the Act discriminates on the basis of viewpoint, but the Act's viewpoint discrimination is independently demonstrated *both* on the face of the Act and by its legislative history.

A. The Act on its face targets speakers by viewpoint.

The Act targets speakers' viewpoint by offering an exemption available only to pro-abortion clinics, because only pro-abortion clinics serve as Medi-Cal providers and Family Planning, Access, Care, and Treatment Program enrollees, which requires

participating clinics to provide family planning services, including all FDA approved contraceptive methods and supplies. Pet. Br. 13, 33. "[A]ll . . . contraceptive methods and supplies" includes abortifacient emergency contraceptives, to which crisis pregnancy centers ("CPCs") have moral objections. *See Clinical Practice Alert, Emergency Contraception*, California Department of Health Care Services: Office of Family Planning, June 2015, http://www.familypact.org/Providers/clinical-practice-alerts/CPA_EC_2015%20June_ADA.pdf. Even any non-CPC clinics covered by the Act and not already exempted are given the option of *becoming* exempted by participating in Medi-Cal and FPACT, an option not available to CPCs, because they object to provision of some or all of the required contraceptives. Thus, "[t]he law on its face burdens disfavored speech by disfavored speakers." *Sorrell*, 564 U.S. at 564.

The facially obvious basis for the exemption underscores the viewpoint-based nature of the discrimination. The State's interest in informing pregnant women about its subsidizing of abortions is equally strong for all such women, regardless of whether those women are seeking services from covered or exempted clinics. The Act exempts clinics participating in Medi-Cal and FPACTP not because those clinics' customers deserve less information, but because those clinics can be expected to provide information about state subsidization of contraceptives and abortion voluntarily. Those clinics provide information about abortion voluntarily because of their viewpoint: they view abortion as a legitimate option and are willing to provide it. CPCs will not voluntarily provide the same information because of their

viewpoint: those clinics exist because they view abortion as a grave injustice.

The law further discriminates by limiting its application in general. Only entities "whose *primary purpose* is providing pregnancy-related services" are covered by the Act. App. 78a. Other facilities offering the same services are not covered. Again, the State's interest in informing customers of those noncovered facilities is precisely the same as its interest in informing the customers of covered, non-exempted facilities. Moreover, the argument that any regulation will more greatly burden, as a moral matter, those who disagree with it does not reflect the concrete difference between crisis pregnancy centers, which must comply, and pro-abortion clinics, which may acquire an exemption.

Even if the exception for FPACTP participants were not available exclusively to pro-abortion clinics, the act would be viewpoint-discriminatory because of the nature of the required speech. Consider, for example, if California were concerned that beef-loving consumers were being tricked into visiting Chick-Fil-A by arguably misleading ads, which feature cows. The state might respond by requiring that *every* fast-food restaurant post a sign saying, "delicious and affordable hamburgers are available at McDonald's, Wendy's, Burger King, and In-N-Out." Such a law forcing the business to give advertising space to competitors, but *only* requiring such space be given to competitors selling beef, would be viewpoint-discriminatory even though it failed to name chicken-only restaurants as its target. This is functionally what the FACT Act requires of crisis pregnancy centers: that they provide free

advertisement for services that they exist to provide an alternative to.

The same would be true of a law analogous to the regulation of unlicensed clinics here: for example, requiring that every fast food restaurant not offering burgers for sale post a notice that it does not sell them, when any chicken-only restaurant surely believes its own offerings are a superior option.[4]

B. The Act's legislative history emphatically establishes (and the State does not deny) that the Act was introduced and passed specifically to target clinics opposed to abortion because of their disfavored viewpoint.

The Ninth Circuit held here that explicitly viewpoint-discriminatory purpose or justification is irrelevant if the resulting law is facially viewpoint-neutral. App. 41a. That holding directly contradicts this Court's admonition that "[t]he government must abstain from regulating when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction," *Rosenberger*, 515 U.S. at 829, which the Court recently reaffirmed in *Sorrell*: "Just as the 'inevitable effect of a statute on its face may render it unconstitutional,' a statute's stated purposes may also be considered." *Sorrell*, 564 U.S. at

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[4] The "factual" nature of the requirements is irrelevant to the viewpoint-discrimination at work here. *See Tam*, 137 S. Ct. at 1763 ("Our cases use the term 'viewpoint' discrimination in a broad sense, see *ibid*, and in that sense, the [clause prohibiting disparagement] bases of 'viewpoint.'").

565 (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968)).

The Act here is indisputably (and undisputedly) motivated by a desire to target CPCs based on their viewpoint. The bill's author cited his disapproval of CPCs' s speech as the reason for introducing it. *See* 9th Cir. EOR 11, 76, 86 (alleging "that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California," and they "aim to discourage and prevent women from seeking abortions," and that, according to pro-abortion activists, "often confuse [and] misinform" women). The "Background" section of Exhibit A from the April 14, 2015 Assembly Committee on Health hearing to discuss the bill *exclusively* concerns CPCs and their disfavored pro-life views. JA39–42.

The thorny problems arising from attempts to discern legislative intent are thus not present here, where everyone – including the author, the Committee on Health, the background information provided to legislators, and the district court – agrees that but for the State's disapproval of the views of CPCs, the Act would not exist. *See Kagan, supra* note 2, at 439 (noting that if "[t]he issue of motive . . . is one of but-for causation: would the restriction on speech have passed – that is, would the outcome of the legislative process have differed – in the absence of ideological considerations?" then "it is unnecessary to consider the essential intent of any individual, much less of the decision-making body; it is irrelevant whether any such intent exists or can exist as a conceptual matter. The 'thing' that a court is attempting to find is only the intrusion of a particular factor in a way that affects the

decision-making process. Whatever questions attach to the notion of collective intent do not place in doubt these but-for causes of governmental action.").

Again, this Court instructs that "[t]he government must abstain from regulating when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. The Ninth Circuit's dissent must give way.

III. THE ACT FORCES LICENSED CLINICS TO CONVEY A MESSAGE CONTRARY TO THEIR VIEWPOINT.

This Court's "cases use the term 'viewpoint' discrimination in a broad sense[.]'" *Tam*, 137 S. Ct. at 1763. It is of no moment that the compelled speech at issue is "factual." *Riley*, 487 U.S. at 797–98. That a statement is one of fact "does not divorce the speech from its moral or ideological implications," *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014), so "[the] general rule that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact." *Hurley*, 515 U.S. at 573.

The Fourth Circuit recently got this right in a similar case. With regard to a similar disclosure, it noted that "'[t]hough the information conveyed may be strictly factual, the context surrounding the delivery of it promotes the viewpoint the state wishes to encourage." *Stuart*, 774 F.3d at 253. Just as requiring Planned Parenthood to advertise the existence of no-kill clinics would imply a viewpoint about the practices of Planned Parenthood, requiring CPCs to advertise

abortion subsidies implies a viewpoint about the legitimacy of abortion.

The consequence of the Act is that no covered licensed clinic in California may decline to suggest abortion to often-desperate pregnant women (except, of course, those clinics that the State expects will do so anyway and accordingly exempts), and every advertisement by a covered unlicensed clinic must suggest the State's view that the clinic is deficient or inferior.

A content-based restriction would concern all discussion of abortion. The fact that California excuses those who support abortion but compels those who oppose abortion crosses the line into viewpoint discrimination. The First Amendment will not tolerate such compulsion, and the Court's precedent does not support the State's argument to the contrary.

CONCLUSION

The Act targets disfavored speakers for compelled speech contrary to CPCs' viewpoint. The Ninth Circuit's decision cannot be allowed to stand, and the Court should accordingly reverse.

Respectfully submitted,

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APPENDIX A

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